

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS EDWARD BYRD,

Defendant-Appellee.

UNPUBLISHED

March 14, 2006

No. 264811

Livingston Circuit Court

LC No. 95-008878-FH

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting defendant relief from his November 4, 1996, conviction for several counts of criminal sexual conduct. We reverse.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d (sexual penetration with a victim under sixteen years old), and two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e (sexual contact with a victim under sixteen years old).

This case arose after defendant, who was in his forties, took his good friend's fourteen-year-old daughter into his home on the weekend of July 4, 1994. Defendant had been a long-time friend of the victim's mother, who was having difficulty maintaining peace between her new boyfriend and the victim in her home. On the first night the victim stayed with defendant, and while his wife was out of town, defendant went into the victim's bedroom and engaged her in discussions of sexual matters. Conscientious of her own development, the victim expressed concern that her breasts were not developing normally. Defendant lifted her shirt, felt them with his hands, and then sucked them. Defendant then continued to discuss sexual topics with the victim, but the victim was less receptive so defendant soon left the room. Some information about the incident was filtered to defendant's wife, but the victim stayed in the home and more sexual contact followed. Her sexual relationship with defendant rapidly developed, and within a few weeks, she and defendant were maintaining a sexual relationship that lasted seven months. The relationship ended when the victim reconciled with her mother and returned to her mother's home, which occurred around the time defendant and his wife were expecting the arrival of their first child.

The case was tried, and on November 4, 1996, the jury returned a verdict of guilty on all counts. Ten days after the guilty verdict was returned, the parties stipulated that the dates of the

actions underlying those convictions preceded the effective date of the charging statute, which technically violated ex post facto strictures. The court entered a stipulated order directing a verdict of acquittal on the two CSC IV convictions. Before sentencing, defendant moved for new trial, claiming that the trial court's instructions were coercive. The trial court denied the motion and sentenced defendant to concurrent prison terms of 5 to 15 years for each CSC III conviction.

This case then underwent extensive appellate review both in our state courts and the federal courts. Defendant first appealed his conviction as of right to this Court, challenging that the jury instructions following a brief deadlock coerced the jury into finding defendant guilty. Defendant also argued that his trial counsel was ineffective for introducing evidence of uncharged sexual acts, and the trial court incorrectly scored defendant's sentencing guidelines. We affirmed defendant's convictions in an unpublished opinion. *People v Byrd*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 21, 1999 (Docket No. 200355). On July 15, 1999, defendant presented a delayed application for leave to appeal to the Michigan Supreme Court, and moved to add two new issues, namely prosecutorial misconduct and the jury's improper consideration of the later-dismissed CSC IV charges. *People v Byrd*, 461 Mich 966; 609 NW2d 188 (2000). Defendant's attempt to receive habeas corpus relief in the federal district court was also unsuccessful, partly because the district court found that, in the state system, defendant failed to raise in a timely manner his issues of prosecutor misconduct and the jury's hearing of the CSC IV charges. The United States Court of Appeals for the Sixth Circuit denied defendant's application for a certificate of appealability on November 6, 2002.

More than two years later, defendant filed the instant motion for relief from judgment in the trial court. Defendant added the new allegations that appellate counsel provided ineffective assistance, and that a witness for the prosecution acted as bailiff and escorted the jury to lunch a few hours before it returned its guilty verdict. Defendant also reiterated his argument that his right to receive a fair trial was fatally undermined by the introduction of evidence related to the CSC IV charges. Defendant argued that this evidence should only have been admissible as MRE 404(b) evidence, which would have entitled him to a limiting instruction. In the absence of such an instruction, defendant argued that reversal was required under *People v Basinger*, 203 Mich App 603; 513 NW2d 828 (1994). The trial court disagreed with the factual basis for defendant's argument regarding the testifying bailiff, and did not address his argument regarding ineffective assistance. Nevertheless, the trial court reviewed defendant's argument regarding CSC IV evidence and granted defendant's motion for new trial, stating:

As to Defendant's argument that he is entitled to a new trial based upon the introduction of charged crimes, the Prosecution argues that defense counsel was aware of the defect in the CSC 4th charges and made a tactical decision to allow the matter to go to the jury. A strategy posited is that, had defense counsel made a pre-trial motion to dismiss the CSC-4 charges, the charges could have been amended to CSC-2, as Defendant was the court-appointed guardian for the victim. However, the prosecution may also have chosen not to amend. In which case, the evidence regarding those two instances would only have been admitted into evidence had it met the standard for MRE 404(b), as announced in *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). Thus entitling Defendant

to a limiting instruction. Pursuant to *People v Basinger*, . . . Defendant is entitled to a new trial.

On appeal, plaintiff argues that the trial court erred in relying on *Basinger*. We agree. The defendant in *Basinger* timely raised a motion for new trial based on the erroneous inclusion of charges and raised the issue again in his appeal of right. In this case, defendant did not raise the issue until his appeal to the Michigan Supreme Court. *Basinger* involved a direct appeal, not a motion for relief from judgment, MCR 6.508, brought after all other appeals proved fruitless. Moreover, the issue in *Basinger* was related to the effect of new legal precedent on the charges, but the trial court in this case dismissed of defendants' CSC IV charges through stipulation on the basis of information that was always available to the parties, namely the date of the offense and the effective date of the charged statute. Accordingly, *Basinger* is distinguishable.

A party can obtain relief from judgment pursuant to MCR 6.508(D), but the trial court may not grant the motion if it,

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case

It is undisputed that the court failed to explicitly address the good cause and actual prejudice requirements of the court rule. Nevertheless, defendant has not established the requisite actual prejudice, so remand to determine this issue is not necessary. See *People v Mosly*, 259 Mich App 90, 94-95; 672 NW2d 897 (2000). The evidence regarding the CSC IV charges was clearly admissible to support defendant's CSC III charges because it proved defendant's system, plan, or scheme in grooming the victim for sexual activity. Therefore, the only prejudice defendant raises is the lack of a limiting instruction. The victim testified at length about the sexual activities underlying defendant's CSC III convictions, as well as the sexual contact that established the sexual environment preceding those activities. The jury was left to accept or reject this unchallenged testimony, and an instruction forbidding it from considering the evidence of sexual contact as evidence of defendant's character would not have any likelihood of persuading the jury to reject the victim's testimony and acquit defendant of CSC

III. Rather, the jury would simply have used the testimony as evidence of defendant's scheme and convicted him of CSC III, much like it did.

Further, the asserted "irregularity" was not "so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect" MCR 6.508(D)(3)(b)(iii). Defendant has failed to prove that his trial counsel was not harboring the infirmities with the CSC IV charges until the conclusion of trial, and in the absence of a request or objection, a trial court has no duty to deliver a limiting instruction sua sponte. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). In light of the fact that a trial court has no affirmative duty to always provide the instruction, the failure to give it does not undermine the foundations of the judicial process. Therefore, the trial court abused its discretion in granting defendant's motion for relief from judgment.

The trial court's grant of relief from judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Peter D. O'Connell